

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP
Alex Spiro (admitted pro hac vice)
2 alexspiro@quinnemanuel.com
51 Madison Avenue, 22nd Floor
3 New York, New York 10010
Telephone: (212) 849-7000

4 QUINN EMANUEL URQUHART & SULLIVAN, LLP
Robert M. Schwartz (Bar No. 117166)
robertschwartz@quinnemanuel.com
6 Michael T. Lifrak (Bar No. 210846)
michaellifrak@quinnemanuel.com
7 Jeanine M. Zalduendo (Bar No. 243374)
jeaninezalduendo@quinnemanuel.com
8 865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
9 Telephone: (213) 443-3000

10 *Attorneys for Defendant Elon Musk*

11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14

15 VERNON UNSWORTH,
16 Plaintiff,
17 vs.
18 ELON MUSK,
19 Defendant.

Case No. 2:18-cv-08048

Judge: Hon. Stephen V. Wilson

**DEFENDANT'S MEMORANDUM OF
CONTENTIONS OF FACT AND
LAW**

Complaint Filed: September 17, 2018
Trial Date: December 2, 2019

Hearing Date: November 25, 2019
Time: 3:00 p.m.
Courtroom: 10A

TABLE OF CONTENTS

	Page
MEMORANDUM OF CONTENTIONS OF FACT AND LAW.....	1
I. THE PARTIES' CLAIMS AND DEFENSES.....	1
A. Mr. Unsworth's Claims.....	1
1. Defamation Per Se.....	1
2. Defamation Per Quod.....	3
B. Mr. Musk's Affirmative Defenses.....	4
1. Consent.....	4
2. Unclean Hands.....	5
3. Failure to Mitigate Damages.....	6
4. Failure to Request a Retraction.....	7
II. ANTICIPATED EVIDENTIARY ISSUES.....	7
III. IDENTIFICATION OF ANY ISSUES OF LAW.....	8
1. Mr. Unsworth Invited And Induced Mr. Musk's Comments, Barring Any Claim Based Upon Them.....	9
2. Mr. Unsworth Is A Public Figure.....	11
3. BuzzFeed's Republication Of Mr. Musk's Statements Was Not Reasonably Foreseeable.....	13
4. The Statements Could Not Be Understood In A Defamatory Way.....	15
5. Mr. Unsworth May Recover Only Limited Damages Because He Did Not Request A Retraction.....	17
IV. BIFURCATION OF ISSUES.....	18
V. JURY TRIAL.....	18
VI. ATTORNEY'S FEES.....	18
VII. ABANDONMENT OF ISSUES.....	18

TABLE OF AUTHORITIES

Page

CASES

1		
2		
3		
4		
5	<i>Anderson v. Hearst Pub. Co.</i> ,	
6	120 F. Supp. 850 (S.D. Cal. 1954)	17
7	<i>Atlanta Journal-Constitution v. Jewell</i> ,	
8	555 S.E.2d 175 (Ga. App. 2001)	12
9	<i>Bryan v. News Corp.</i> ,	
10	2018 WL 720057 (Cal. Ct. App. Feb. 6, 2018).....	2, 3, 14
11	<i>Bueno v. Becker</i> ,	
12	2016 WL 4506070 (Cal. Ct. App. Aug. 29, 2016).....	5, 9
13	<i>Chandler v. Berlin</i> ,	
14	2019 WL 1471336 (D.D.C., Apr. 3, 2019)	14
15	<i>Chavez v. Ill. State Police</i> ,	
16	251 F.3d 612 (7th Cir. 2001)	8
17	<i>Copp v. Paxton</i> ,	
18	45 Cal. App. 4th 829 (1996)	12
19	<i>Curley v. Vick</i> ,	
20	211 Cal. App. 2d 670 (1963)	2, 3, 13
21	<i>Desnick v. Am. Broad. Companies, Inc.</i> ,	
22	1999 WL 51796 (N.D. Ill. Jan. 29, 1999)	7
23	<i>DiGiorgio Corp. v. Valley Labor Citizen</i> ,	
24	260 Cal. App. 2d 268 (1968)	7, 14, 17
25	<i>Gardner v. Martino</i> ,	
26	563 F.3d 981 (9th Cir. 2009)	15
27	<i>Gertz v. Robert Welch, Inc.</i> ,	
28	418 U.S. 323 (1974)	12, 13
	<i>Howard v. S. Cal. Associated Newspapers</i> ,	
	95 Cal. App. 2d 580 (1950)	15
	<i>Information Control Corp. v. Genesis One Computer Corp.</i> ,	
	611 F.2d 781 (9th Cir. 1980)	15
	<i>Jankovic v. Int'l Crisis Grp.</i> ,	
	822 F.3d 576 (D.C. Cir. 2016)	12
	<i>Kaelin v. Globe Commc'ns Corp.</i> ,	
	162 F.3d 1036 (9th Cir. 1998)	15

1	<i>Kendall-Jackson Winery, Ltd. v. Superior Court,</i>	
2	76 Cal. App. 4th 970 (1999)	
3	<i>as modified on denial of reh’g</i> (Jan. 3, 2000).....	6
4	<i>Koch v. Goldway,</i>	
5	817 F.2d 507 (9th Cir. 1987).....	15
6	<i>MacArthur v. San Juan Cty.,</i>	
7	416 F. Supp. 2d 1098 (D. Utah 2005)	8
8	<i>Marisol A. v. Giuliani,</i>	
9	126 F.3d 372 (2d Cir. 1997)	8
10	<i>Masson v. New Yorker Magazine, Inc.,</i>	
11	501 U.S. 496 (1991)	16
12	<i>Mitchell v. Superior Court,</i>	
13	37 Cal. 3d 268 (1984).....	1, 2, 3, 14
14	<i>N. Jackson Pharm., Inc. v. Caremark RX, Inc.,</i>	
15	385 F. Supp. 2d 740 (N.D. Ill. 2005)	8
16	<i>New York Times Co. v. Sullivan,</i>	
17	376 U.S. 254 (1964)	12
18	<i>People v. Davidson,</i>	
19	2015 WL 4751166 (Cal. Ct. App. Aug. 12, 2015).....	5, 9, 10
20	<i>Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.,</i>	
21	946 F. Supp. 2d 957 (N.D. Cal. 2013)	
22	<i>aff’d</i> , 609 F. App’x 497 (9th Cir. 2015).....	6
23	<i>Puranmalka v. Puranmalka,</i>	
24	149 A.D.2d 493 (N.Y. App. Div. 1989).....	5
25	<i>Royer v. Steinberg,</i>	
26	90 Cal. App. 3d 490 (1979).....	5, 9, 11
27	<i>Shively v. Bozanich,</i>	
28	31 Cal. 4th 1230 (2003)	
	<i>as modified</i> (Dec. 22, 2003)	1, 3, 7, 14
	<i>Sleepys LLC v. Select Comfort Wholesale Corp.,</i>	
	779 F.3d 191 (2d Cir. 2015).....	5, 9, 11
	<i>Stanley v. Davis,</i>	
	2015 WL 435077 (N.D. Cal. Feb. 2, 2015).....	8
	<i>Unilogic, Inc. v. Burroughs Corp.,</i>	
	10 Cal App. 4th 612 (1992).....	6
	<i>Waldbaum v. Fairchild Publications, Inc.,</i>	
	627 F.2d 1287 (D.C. Cir. 1980)	12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATUTORY AUTHORITIES

Cal. Civ. Code § 48a.....7, 17

RULES AND REGULATIONS

Fed. R. Civ. P. 16(c)(2)(A).....8

Local Rule 16.....8

Local Rule 16-4 1

TREATISES

Wright & Miller *Fed. Prac. & Proc. Civ.* § 1525 (3d ed. 2019).....8

ADDITIONAL AUTHORITIES

CACI 1702 1, 2

CACI 17033, 4

CACI 17215

CACI 17227

CACI 39306

Matthew Bender, Cal. Forms of Jury Instruction 300F.29.....5

Restatement (Second) of Torts § 583 (1977).....9

Restatement (Second) of Torts § 892 (1979).....5, 9

1 **MEMORANDUM OF CONTENTIONS OF FACT AND LAW**

2 Pursuant to Local Rule 16-4, Defendant Elon Musk submits this memorandum
3 of contentions of fact and law.

4 **I. THE PARTIES' CLAIMS AND DEFENSES.**

5 **A. Mr. Unsworth's Claims.**

6 Mr. Musk anticipates that Mr. Unsworth will pursue the following two pleaded
7 claims at trial:

8 **1. Defamation Per Se.**

9 Summary: Mr. Unsworth alleges that Mr. Musk is liable for defamation per se
10 for statements Mr. Unsworth asserts call Mr. Unsworth a pedophile, a child rapist, a
11 child sex-trafficker, and the husband to a 12-year old bride in tweets of July 15-17,
12 2018 and in a September 4, 2018 BuzzFeed article.

13 Elements: Assuming that Mr. Unsworth is a private figure and the statements
14 were on a matter of public concern, the elements of defamation per se are as follows:
15 Mr. Unsworth must prove (1) that Mr. Musk published one or more of the statements
16 to a person other than Mr. Unsworth; (2) that these people reasonably understood that
17 the statements made to another person were about Mr. Unsworth; (3) that these
18 people reasonably understood the statements made to another person to mean that Mr.
19 Unsworth was a pedophile, a child rapist, a child sex-trafficker, and the husband to a
20 12-year old bride; (4) that the statements were false; and (5) that Mr. Musk failed to
21 use reasonable care to determine the truth or falsity of the statements. Source: CACI
22 1702.

23 To the extent that liability is premised on republication of Mr. Musk's
24 statements, Mr. Unsworth must also show that Mr. Musk authorized or intended such
25 republication, or that the republication was reasonably foreseeable. For the
26 republication to be reasonably foreseeable, it must have been an expected
27 consequence of Mr. Musk's actions. Source: *See Shively v. Bozanich*, 31 Cal. 4th
28 1230 (2003), *as modified* (Dec. 22, 2003); *Mitchell v. Superior Court*, 37 Cal. 3d 268

(1984); *Bryan v. News Corp.*, 2018 WL 720057 (Cal. Ct. App. Feb. 6, 2018); *Curley v. Vick*, 211 Cal. App. 2d 670 (1963).

To recover actual damages, Mr. Unsworth must show that Mr. Musk's wrongful conduct was a substantial factor in causing any of the following: (1) harm to Mr. Unsworth's property, business, trade, profession, or occupation; (2) expenses Mr. Unsworth had to pay as a result of the defamatory statements; (3) harm to Mr. Unsworth's reputation; or (4) shame, mortification, or hurt feelings. Source: CACI 1702.

If Mr. Unsworth does not prove actual damages for harm to reputation or shame, mortification, or hurt feelings, but proves by clear and convincing evidence that Mr. Musk knew the statements were false or that he had serious doubts about the truth of the statements, then the law assumes that Mr. Unsworth's reputation has been harmed and that he has suffered shame, mortification, or hurt feelings. Without presenting evidence of damage, Mr. Unsworth is entitled to compensation for this assumed harm. Source: CACI 1702.

Mr. Unsworth may recover damages to punish Mr. Musk if he proves by clear and convincing evidence that Mr. Musk knew the statements were false or that he had serious doubts about the truth of the statements, and if he proves by clear and convincing evidence that Mr. Musk acted with malice, oppression, or fraud. Source: CACI 1702.

Mr. Musk's Evidence in Opposition: The evidence will show that the allegedly defamatory statements were protected opinion, and not actionable statements of fact. Even if the jury finds they were statements of fact, the statements examined in context cannot be understood to defame Mr. Unsworth and, indeed, Mr. Unsworth is not aware of anyone who believed the purportedly factual assertions he attributes to Mr. Musk's statements. Mr. Musk did not intend, authorize, or expect BuzzFeed to publish his off-the-record statements, and BuzzFeed's policies at the time did not specify a need for a prior agreement for a statement to be treated as off-the-record.

1 Mr. Unsworth invited, and therefore consented to, Mr. Musk's statements and
 2 therefore should not benefit from his own conduct. Finally, Mr. Unsworth has not
 3 established any damages and failed to mitigate any damages he did suffer, including
 4 by failing to try to stop BuzzFeed's publication or to seek a retraction.

5 **2. Defamation Per Quod.**

6 Summary: Mr. Unsworth alleges that Mr. Musk is liable for defamation per
 7 quod for his statements calling Mr. Unsworth a liar in his tweets of July 15-17, 2018
 8 and in the September 4, 2018 BuzzFeed article.

9 Elements: Assuming that Mr. Unsworth is a private figure and the statements
 10 were on a matter of public concern, the elements of defamation per quod are as
 11 follows: Mr. Unsworth must prove (1) that Mr. Musk published one or more of the
 12 statements to a person other than Mr. Unsworth; (2) that these people reasonably
 13 understood that the statements made to another person were about Mr. Unsworth; (3)
 14 that because of the facts and circumstances known to the readers of the statements,
 15 they tended to injure Mr. Unsworth in his occupation, or to expose him to hatred,
 16 contempt, ridicule, or shame, or to discourage others from associating or dealing with
 17 him; (4) that the statements were false; (5) that Mr. Musk failed to use reasonable
 18 care to determine the truth or falsity of the statements; (6) that Mr. Unsworth suffered
 19 harm to his property, business, profession, or occupation; and (7) that the statement
 20 was a substantial factor in causing Mr. Unsworth's harm. Source: CACI 1703.

21 As discussed *supra*, to the extent that liability is premised on republication, Mr.
 22 Unsworth must show that Mr. Musk authorized or intended such republication or that
 23 such republication was reasonably foreseeable. For the republication to be
 24 reasonably foreseeable, it must have been an expected consequence of Mr. Musk's
 25 actions. Source: *See Shively v. Bozanich*, 31 Cal. 4th 1230 (2003), *as modified* (Dec.
 26 22, 2003); *Mitchell v. Superior Court*, 37 Cal. 3d 268 (1984); *Bryan v. News*
 27 *Corp.*, 2018 WL 720057 (Cal. Ct. App. Feb. 6, 2018); *Curley v. Vick*, 211 Cal. App.
 28 2d 670 (1963).

1 To recover actual damages, Mr. Unsworth must show that Mr. Musk's wrongful
 2 conduct was a substantial factor in causing any of the following: (1) harm to Mr.
 3 Unsworth's property, business, trade, profession, or occupation; (2) expenses Mr.
 4 Unsworth had to pay as a result of the defamatory statements; (3) harm to Mr.
 5 Unsworth's reputation; or (4) shame, mortification, or hurt feelings. Source: CACI
 6 1703.

7 Mr. Unsworth may recover damages to punish Mr. Musk if he proves by clear
 8 and convincing evidence that Mr. Musk knew the statements were false or that he had
 9 serious doubts about the truth of the statements, and if he proves by clear and
 10 convincing evidence that Mr. Musk acted with malice, oppression, or fraud. Source:
 11 CACI 1703.

12 Mr. Musk's Evidence in Opposition: The evidence will show that the allegedly
 13 defamatory statements were protected opinion, and not actionable statements of fact.
 14 Even if the jury finds they were statements of fact, the factual assertion that Mr.
 15 Unsworth is a liar is true. Mr. Musk did not intend, authorize, or expect BuzzFeed to
 16 publish his off-the-record statements and BuzzFeed's policies at the time did not
 17 specify the need for a prior agreement for a statement to be treated as off-the-record.
 18 Mr. Unsworth invited, and therefore consented to, Mr. Musk's statements and
 19 therefore should not benefit from his own conduct. Finally, Mr. Unsworth has not
 20 established any damages and failed to mitigate any damages he did suffer, including
 21 by failing to try to stop BuzzFeed's publication or to seek a retraction.

22 **B. Mr. Musk's Affirmative Defenses.**

23 Mr. Musk asserts the following affirmative defenses with regard to the
 24 allegedly defamatory statements contained in his Tweets and in the September 4,
 25 2018 BuzzFeed article:

26 **1. Consent.**

27 Summary: Mr. Musk asserts that Mr. Unsworth's claims are barred because he
 28 consented to the publication of Mr. Musk's statements.

1 Elements: Mr. Musk is not responsible for any reputational harm Mr.
 2 Unsworth claims has incurred if Mr. Musk shows that Mr. Unsworth consented, by
 3 words or conduct, to the publication or republication of Mr. Musk's communication
 4 of the statement to others. Inaction or silence can constitute actual or implied consent
 5 to publication. Consent may be inferred from the circumstances surrounding Mr.
 6 Unsworth's words or conduct. Source: CACI 1721; *Royer v. Steinberg*, 90 Cal. App.
 7 3d 490 (1979); *Bueno v. Becker*, 2016 WL 4506070 (Cal. Ct. App. Aug. 29, 2016);
 8 *People v. Davidson*, 2015 WL 4751166 (Cal. Ct. App. Aug. 12, 2015); *see also*
 9 *Sleepys LLC v. Select Comfort Wholesale Corp.*, 779 F.3d 191 (2d Cir. 2015);
 10 *Puranmalka v. Puranmalka*, 149 A.D.2d 493 (N.Y. App. Div. 1989); Restatement,
 11 Torts, 2d, § 892.

12 Mr. Musk's Evidence in Support: The evidence will show that Mr. Unsworth
 13 sought to use his proximity to the Thai Cave rescue as means for monetary gain. To
 14 do so, Mr. Unsworth asserted on an international news broadcast that Mr. Musk did
 15 not care about the lives of the trapped boys and was engaging in only a PR stunt,
 16 provoking a response from Mr. Musk. Later, as a result of Mr. Unsworth publicizing
 17 his letter threatening to sue Mr. Musk, which expressly invited Mr. Musk to respond,
 18 Mr. Musk responded with an "off-the-record" email to a BuzzFeed reporter directing
 19 him to further investigate Mr. Unsworth's background based on information provided
 20 by an investigator on the subject matter that Mr. Unsworth claimed was defamatory.

21 2. Unclean Hands.

22 Summary: Mr. Musk asserts that Mr. Unsworth's claims are barred because
 23 Mr. Unsworth's conduct connected with the issues in this case was inequitable and
 24 resulted in prejudice to Mr. Musk.

25 Elements: Mr. Musk must show (1) that Mr. Unsworth's conduct has been
 26 inequitable, unfair, unconscionable, or deceitful; (2) that such conduct resulted in
 27 prejudice to Mr. Musk; and (3) Mr. Unsworth's misconduct was connected with the
 28 issues in this case. Source: Matthew Bender, Cal. Forms of Jury Instruction 300F.29;

1 *Unilogic, Inc. v. Burroughs Corp.*, 10 Cal App. 4th 612 (1992); *Kendall–Jackson*
 2 *Winery, Ltd. v. Superior Court*, 76 Cal. App. 4th 970 (1999), *as modified on denial of*
 3 *reh’g* (Jan. 3, 2000); *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F.
 4 Supp. 2d 957 (N.D. Cal. 2013), *aff’d*, 609 F. App’x 497 (9th Cir. 2015).

5 Mr. Musk’s Evidence in Support: The evidence will show that Mr. Unsworth
 6 sought to monetize his proximity to the Thai Cave rescue by baselessly attacking Mr.
 7 Musk’s motivation for assisting the trapped boys. Mr. Unsworth engaged in a
 8 campaign, starting when the rescue was still underway, to claim fame and fortune for
 9 himself, while diminishing the role and recognition accorded everyone else involved.
 10 As part of this campaign, Mr. Unsworth asserted on an international news broadcast
 11 that Mr. Musk did not care about the lives of the trapped boys and was engaging in
 12 only a PR stunt.

13 **3. Failure to Mitigate Damages.**

14 Summary: Mr. Musk asserts that Mr. Unsworth’s damages must be reduced to
 15 the extent that he failed to mitigate his damages, in particular in failing to request that
 16 BuzzFeed not publish its September 4, 2018 article and in failing to request a
 17 retraction.

18 Elements: Mr. Musk must prove by a preponderance of the evidence that Mr.
 19 Unsworth has failed to minimize his damages. A plaintiff who has been injured by
 20 the defamation of another must use reasonable care to prevent any aggravation or
 21 increase of the injury. Mr. Unsworth is not entitled to be compensated for any injury
 22 or aggravation of injury caused by his failure to minimize damages. His damages
 23 award must be reduced to the extent that Mr. Unsworth made his condition worse by
 24 not taking reasonable care to prevent any aggravation or increase of the injury.

25 Source: CACI 3930.

26 Mr. Musk’s Evidence in Support: The evidence will show that, to the extent
 27 any damages exist, Mr. Unsworth failed to mitigate. Despite knowing about it in
 28 advance, Mr. Unsworth never urged BuzzFeed not to publish the allegedly

1 defamatory article and instead welcomed it. Once the article was published, Mr.
2 Unsworth never requested a retraction from BuzzFeed.

3 **4. Failure to Request a Retraction.**

4 Summary: Mr. Musk asserts that, with regard to any alleged damages resulting
5 from BuzzFeed's republication of Mr. Musk's statements in the September 4, 2018
6 article, Mr. Unsworth may recover only special damages because he failed to request
7 a retraction.

8 Elements: Because BuzzFeed News is a news publication, Mr. Unsworth may
9 recover for the republication of Mr. Musk's statements by BuzzFeed News only the
10 following:

- 11 a. Damages to property, business, trade, profession, or occupation; and
- 12 b. Damages for money spent as a result of the defamation.

13 However, this limitation does not apply if Mr. Unsworth proves both of the
14 following:

- 15 a. That Mr. Unsworth demanded a correction of the statement within 20
16 days of discovering the statement; and
- 17 b. That BuzzFeed News did not publish an adequate correction.

18 Source: CACI 1722; Cal. Civ. Code, § 48a; *Shively v. Bozanich*, 31 Cal. 4th 1230
19 (2003), *as modified* (Dec. 22, 2003); *DiGiorgio Corp. v. Valley Labor Citizen*, 260
20 Cal. App. 2d 268 (1968); *see also Desnick v. Am. Broad. Cos., Inc.*, 1999 WL 51796
21 (N.D. Ill. Jan. 29, 1999).

22 Mr. Musk's Evidence in Support: Mr. Unsworth is suing Mr. Musk
23 based on BuzzFeed's allegedly defamatory article, but Mr. Unsworth never requested
24 a retraction from BuzzFeed and thus BuzzFeed has never published a retraction.

25 **II. ANTICIPATED EVIDENTIARY ISSUES.**

26 The parties continue to work in good faith to narrow, if not resolve, evidentiary
27 disputes. Notwithstanding those efforts, Mr. Musk anticipates that there may be
28

1 evidentiary disputes that will be the subject of motions *in limine* or other pre-trial
2 submissions filed by both parties.

3 **III. IDENTIFICATION OF ANY ISSUES OF LAW.**

4 Rule 16 empowers district courts, at any pretrial conference, to “consider and
5 take appropriate action on ... formulating and simplifying the issues, and eliminating
6 frivolous claims or defenses.” Fed. R. Civ. P. 16(c)(2)(A). In this regard, “Rule
7 16(c), of course, affords the district court wide latitude at pre-trial conferences to
8 narrow the issues and to require, in advance of trial, that plaintiffs pinpoint the
9 evidence they will rely on to prove each individual claim.” *Marisol A. v. Giuliani*,
10 126 F.3d 372, 379 (2d Cir. 1997); *see Stanley v. Davis*, 2015 WL 435077, at *3 (N.D.
11 Cal. Feb. 2, 2015) (noting that “Fed. R. Civ. Pro. 16(c)(2) allows a district court
12 broad authority to take action on a variety of pre-trial matters”); 6A Wright & Miller
13 Fed. Prac. & Proc. Civ. § 1525 (3d ed. 2019) (“The court thus is directed to define the
14 issues, facts, and theories actually in contention, which means that extraneous issues
15 should be weeded out.”).

16 Because Rule 16 authorizes district courts to use the pretrial conference “to
17 determine whether there are any issues remaining in the case that justify proceeding
18 to a full trial on the merits,” the Court may simplify the upcoming trial in this case by
19 dismissing claims that cannot be proved. *Chavez v. Ill. State Police*, 251 F.3d 612,
20 654 (7th Cir. 2001) (quotation marks omitted) (affirming dismissal of claims pursuant
21 to Rule 16); *N. Jackson Pharm., Inc. v. Caremark RX, Inc.*, 385 F. Supp. 2d 740, 743
22 (N.D. Ill. 2005) (granting motion to narrow issues under Rule 16); *MacArthur v. San*
23 *Juan Cty.*, 416 F. Supp. 2d 1098, 1112-13 (D. Utah 2005) (dismissing unsupportable
24 claims pursuant to Rule 16).

25 Mr. Musk identifies the following issues of law:
26
27
28

1 **1. Mr. Unsworth Invited And Induced Mr. Musk's Comments,**
 2 **Barring Any Claim Based Upon Them.**

3 This Court should dismiss prior to trial Mr. Unsworth's claims as to Mr.
 4 Musk's tweets and BuzzFeed's publication of Mr. Musk's response to Mr.
 5 Unsworth's lawsuit threat because Mr. Unsworth impliedly consented to these
 6 publications. Mr. Unsworth directly challenged Mr. Musk's motivations for assisting
 7 in the Thai Cave rescue, thus inviting Mr. Musk's corresponding challenge to Mr.
 8 Unsworth's motivations. And Mr. Unsworth's counsel published his lawsuit demand
 9 letter on Twitter and sent it to media entities, thus inviting media attention and
 10 comment from Mr. Musk, which BuzzFeed published.

11 “The primary purposes of the doctrine of consent in defamation law is to
 12 prevent a party from inviting or inducing indiscretion and thereby laying the
 13 foundation of a lawsuit for his own pecuniary gain.” *Royer v. Steinberg*, 90 Cal. App.
 14 3d 490, 499 (1979) (cited in CACI 1721); *see also Sleepys LLC v. Select Comfort*
 15 *Wholesale Corp.*, 779 F.3d 191, 199-200 (2d Cir. 2015) (“[I]n some circumstances, a
 16 person's intentional eliciting of a statement she expects will be defamatory can
 17 constitute her consent to the making of the statement.”). “[C]onduct that gives
 18 apparent consent is sufficient to bar recovery.” Restatement (Second) of Torts § 583
 19 (1977). “Whether words or other conduct are reasonably to be interpreted as
 20 expressions of consent to the publication is to be determined by the reasonable
 21 inferences from the conduct in the light of the circumstances surrounding it.” *Id.*
 22 Consent in fact may “be manifested by silence or inaction, if the circumstances or
 23 other evidence indicate that the silence or inaction is intended to give
 24 consent.” Restatement (Second) of Torts § 892 (1979); *see generally, Bueno v.*
 25 *Becker*, 2016 WL 4506070, at *2 (Cal. Ct. App. Aug. 29, 2016) (discussing consent
 26 in tort and contract, holding that “plaintiff may also express consent by silence or
 27 inaction if a reasonable person would understand that the silence or inaction intended
 28 to indicate consent”); *People v. Davidson*, 2015 WL 4751166, at *7 n. 3 (Cal. Ct.

1 App. Aug. 12, 2015) (discussing California civil jury instructions on consent, noting a
2 “person may also express consent by silence or inaction if a reasonable person would
3 understand that the silence or inaction intended to indicate consent”).

4 Although the tweets and BuzzFeed’s republication of Mr. Unsworth’s emails
5 must be analyzed separately, each necessarily resulted from Mr. Unsworth’s inviting
6 public attention to these issues and a response from Mr. Musk.

7 As to the tweets, Mr. Unsworth’s baseless accusations on an international news
8 broadcast that Mr. Musk did not care about the lives of the trapped boys and was
9 engaging in only a PR stunt was targeted—intentionally or not—at provoking a
10 response from Mr. Musk. Mr. Unsworth criticized Mr. Musk’s rescue efforts and
11 insulted Mr. Musk by making off-color remarks on CNN. (TX 13, 14.) Unlike Mr.
12 Musk, Mr. Unsworth never apologized, but subsequently doubled down on his
13 remarks, including to journalists. (TX 8.)

14 As to the off-the-record email to the BuzzFeed reporter, Mr. Musk sent that
15 email (and the subsequent email “on background”) as a direct response to Mr.
16 Unsworth publicizing his threat to sue Mr. Musk, in a letter that expressly invited Mr.
17 Musk to respond. Mr. Unsworth’s counsel tweeted the demand letter to Musk (TX
18 876), and sent the demand letter to journalists, including the Editor-in-Chief of
19 BuzzFeed (TX 686).

20 Mr. Musk responded with an “off-the-record” email to a BuzzFeed reporter
21 directing him to look into Mr. Unsworth’s background based on information provided
22 by an investigator on the very subject matter that Mr. Unsworth claimed was
23 defamatory. After learning that Mr. Musk had made statements to BuzzFeed, Mr.
24 Unsworth’s counsel provided comment and facts to BuzzFeed to assist with, rather
25 than attempting to stop, BuzzFeed’s republication of Mr. Musk’s off-the-record
26 statements. (TX 690-694, 702.) Thus, not only did Mr. Unsworth and his
27 representatives fail to request that BuzzFeed not publish the information, they
28

1 voluntarily chose to make a statement to BuzzFeed for inclusion in the allegedly
2 defamatory article.

3 These circumstances fall squarely within the consent exception to liability for
4 defamation. Mr. Unsworth “invit[ed]” and “induc[ed],” *Royer*, 90 Cal. App. 3d at
5 499, Mr. Musk to respond to the baseless accusations that Mr. Musk depravedly used
6 the trapped boys as a PR stunt and crude admonishment that Mr. Musk should “stick
7 his submarine where it hurts.” Mr. Musk responded in turn. And Mr. Unsworth’s
8 repeated public representations that Mr. Unsworth was preparing a lawsuit against
9 Mr. Musk for calling him a pedophile likewise invited media attention and the
10 corresponding response from Mr. Musk. Further, the lawsuit demand letter from Mr.
11 Unsworth’s counsel—which his counsel tweeted out to his followers—specifically
12 requested Mr. Musk respond to the allegation that he defamed Mr. Unsworth. Mr.
13 Unsworth’s counsel’s publication of this letter and invitation to the media to write
14 about it “constituted nothing less than a request for the publication of the evidence”
15 supporting Mr. Musk’s allegedly defamatory statement. *Royer*, 90 Cal. App. 3d at
16 498 (holding a “challenge” “to prove” the truth of the charges qualified as consent);
17 *Sleepys LLC*, 779 F.3d at 199-200 (“When a plaintiff sues for defamation based on a
18 statement of the defendant elicited by the plaintiff with some reason to expect that the
19 defendant’s statement might be defamatory, the more the evidence supports the
20 proposition that the plaintiff elicited the statement with a high degree of certainty that
21 it would be defamatory, for the purpose of enabling a lawsuit, the stronger the
22 defendant’s case for deeming the statement consented to, thus barring the claim.”).

23 For these reasons, this Court should hold that Mr. Unsworth consented, by his
24 conduct, to Mr. Musk’s responses to his inflammatory statements and dismiss the
25 claims prior to trial.

26 **2. Mr. Unsworth Is A Public Figure.**

27 This Court, having already ruled that the Thai Cave rescue is a matter of public
28 concern, also should hold before trial that the “actual malice” standard applies to Mr.

1 Unsworth's claims because the statements are germane to the controversy. *See New*
 2 *York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see also Gertz v. Robert Welch,*
 3 *Inc.*, 418 U.S. 323, 334 (1974).

4 A plaintiff is a limited purpose public figure if there is a public controversy, the
 5 plaintiff voluntarily injects himself into the controversy and/or seeks to influence the
 6 resolution of it, and the alleged defamatory statement is "germane" to the plaintiff's
 7 participation in the controversy. *See Copp v. Paxton*, 45 Cal. App. 4th 829, 845-46
 8 (1996). A statement is germane unless it is "wholly unrelated" to the public
 9 controversy. *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 589 (D.C. Cir. 2016). In
 10 particular, statements are germane if they relate "to understanding [plaintiff's] role
 11 and why he wanted to be involved" in the controversy. *Id.* Because the germaneness
 12 inquiry focuses on the plaintiff's role—and not the nature of the underlying
 13 controversy itself—courts have held comments germane when they bear on a
 14 plaintiff's credibility. Where the plaintiff has injected himself into a public
 15 controversy, the public is entitled to know whether he should be believed. Thus, in
 16 *Waldbaum v. Fairchild Publications, Inc.*, the D.C. Circuit explained that comments
 17 about the plaintiff's "talents, education, experience, and motives" were germane
 18 because such comments "could have been relevant to the public's decision whether to
 19 listen to him." 627 F.2d 1287, 1298 (D.C. Cir. 1980); *see also Atlanta Journal-*
 20 *Constitution v. Jewell*, 555 S.E.2d 175, 183 (Ga. App. 2001) (comments comparing
 21 the plaintiff to a serial killer and discussing his "aberrant personality" and "bizarre
 22 employment history" held germane to a controversy over the 1996 Olympic
 23 bombing).

24 This Court, having indicated that the first two elements of the limited-purpose
 25 public figure test are met, also should hold that the germaneness requirement is met.
 26 Mr. Musk's statements were germane to the question of the propriety of and
 27 motivation for Mr. Unsworth's participation in the rescue. As in *Jewell*, Mr. Musk's
 28 statements about Mr. Unsworth's character "might help the public decide how much

credence should be given to the plaintiff.” 555 S.E.2d at 185. If Mr. Unsworth were a pedophile, the public would be entitled to use that information to evaluate his credibility and motives for participating in the rescue. Consequently, Mr. Musk’s comments were germane, and Mr. Unsworth is at minimum a limited purpose public figure.

Indeed, Mr. Unsworth likely can be considered a general (“all purpose”) public figure. As the Supreme Court explained in *Gertz*, individuals are properly classified as public figures “by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention” 418 U.S. at 342. Mr. Unsworth has used his role in the Thai Cave rescue as a springboard to fame, starting with the CNN interview he gave attacking Mr. Musk.¹ Indeed, Mr. Unsworth has given numerous television interviews, hired an agent, sought book and movie deals, and received a high-profile honor from the Queen of the United Kingdom. (*See, e.g.*, Dkt. 59, at ¶ 18). Thus, Mr. Unsworth may be considered a general public figure.

In either event, this Court should determine before trial that Mr. Unsworth is required to show actual malice.

3. **BuzzFeed’s Republication Of Mr. Musk’s Statements Was Not Reasonably Foreseeable.**

This Court also should narrow the issues for trial by excluding any claims based on BuzzFeed’s publication of Mr. Musk’s off-the-record and “on background” emails because Mr. Musk neither intended, authorized, nor reasonably expected their publication.

¹ Notably, Mr. Unsworth withheld until after the close of discovery hundreds of pages of responsive documents showing his attempts to monetize his role in the rescue and demonstrating he had hired an agent. (Dkt. 118.) Mr. Musk seeks to enforce a trial subpoena to obtain additional communications with his agent as well as other agents and production companies with whom Mr. Unsworth met and communicated. (*Id.*)

1 A defendant is only liable for defamation based on a third-party's republication
2 if the republication was intended or authorized, *Curley v. Vick*, 211 Cal. App. 2d 670,
3 673 (1963), or otherwise "reasonably foreseeable." *Shively v. Bozanich*, 31 Cal. 4th
4 1230, 1243 (2003), *as modified* (Dec. 22, 2003); *see also DiGiorgio Corp. v. Valley*
5 *Labor Citizen*, 260 Cal. App. 2d 268, 273 (1968) (holding original author of an article
6 not liable for republication because republication was not reasonably foreseeable).
7 "Reasonable foreseeability is a narrow exception to the single publication rule," and
8 it is not sufficient that the republication was possible. *Bryan v. News Corp.*, 2018 WL
9 720057, at *10 (Cal. Ct. App. Feb. 6, 2018). Instead, a higher standard applies—
10 whether "the repetition was reasonably to be expected." *Mitchell v. Superior Court*,
11 37 Cal. 3d 268, 281 (1984).

12 The parties here dispute whether the standard for reasonable foreseeability is
13 solely objective, as Mr. Unsworth claims (and Mr. Musk disputes). "Intended,"
14 "authorized," and "expected," however, all depend upon Mr. Musk's genuinely held
15 belief. Mr. Musk clearly marked his email "off the record," (TX 42), and Mr. Musk
16 testified that he never expected BuzzFeed to publish the contents of his emails. No
17 evidence calls into question whether that belief was reasonably held. Instead, the
18 text of the email confirms that Mr. Musk wanted BuzzFeed to investigate the
19 investigator's findings that he was passing along. BuzzFeed's own public standards
20 in effect at the time Mr. Musk sent his email said nothing about an advance
21 agreement being necessary for a communication to remain off the record. (TX 508.)
22 Under no standard could the republication be reasonably foreseeable. *See, e.g.,*
23 *Chandler v. Berlin*, 2019 WL 1471336, at *3-5 (D.D.C. Apr. 3, 2019) (original
24 publisher not liable for the republication of a private document marked "confidential"
25 where publically available information at the time of the original publication would
26 not have put a reasonable person on notice that republication was an expected
27 consequence of his actions). Based on the above, "no reasonable juror could find
28

1 [BuzzFeed’s] republication... reasonably foreseeable.” *Id.* at *5. Thus, the Court
 2 should narrow the issues for trial to exclude the BuzzFeed September 4, 2018 article.

3 **4. The Statements Could Not Be Understood In A Defamatory**
 4 **Way.**

5 This Court also should narrow the issues for trial by excluding any claims
 6 based on Mr. Musk’s emails to BuzzFeed and BuzzFeed’s republication of them
 7 because, as the article makes clear, Mr. Musk’s statements could not be and were not
 8 understood in a defamatory manner.

9 To be actionable defamation, a reasonable reader must believe that statements
 10 are supported by objective facts, otherwise statements are “nonactionable opinion.”
 11 *Gardner v. Martino*, 563 F.3d 981, 987 (9th Cir. 2009). Thus, “the law of defamation
 12 teaches ... that in some instances speech must seek its own refutation without
 13 intervention by the courts” and “[b]ase and malignant speech is not necessarily
 14 actionable.” *Koch v. Goldway*, 817 F.2d 507, 510 (9th Cir. 1987). Even if a
 15 statement could be read as an assertion of fact, a reasonable reader must understand it
 16 to defame the plaintiff for a plaintiff to succeed on a claim for defamation.
 17 *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th
 18 Cir. 1980).

19 “[A] defamatory meaning must be found, if at all, in a reading of the
 20 publication as a whole.” *Kaelin v. Globe Commc’ns Corp.*, 162 F.3d 1036, 1041 (9th
 21 Cir. 1998). “In determining whether or not [a publication] is libelous, the article must
 22 be read as a whole in order to understand its import and the effects which it was
 23 calculated to have upon the minds of those who read it.” *Howard v. S. Cal.*
 24 *Associated Newspapers*, 95 Cal. App. 2d 580, 584 (1950) (citation omitted). As the
 25 Ninth Circuit has explained, a court must “examine the statement in its totality in the
 26 context in which it was uttered or published,” “must consider all the words used, not
 27 merely a particular phrase or sentence,” and “must give weight to cautionary terms
 28 used by the person publishing the statement.” *Information Control Corp.*, 611 F.2d

1 at 784. Finally, the court must consider all of the circumstances surrounding the
2 statement, including the medium by which the statement is disseminated and the
3 audience to which it is published.” *Id.*

4 No reasonable factfinder could find that the September 4, 2018 BuzzFeed
5 article contains defamatory statements of objective fact accusing Mr. Unsworth of
6 being, *inter alia*, a pedophile, a child rapist, a child sex-trafficker, or the husband of a
7 12-year old bride. The article does accuse Mr. Unsworth of engaging in any
8 untoward behavior, and does not even imply that anything Mr. Musk said about him
9 is true. The entire point of the BuzzFeed article was that BuzzFeed had not been able
10 to verify Mr. Musk’s statements. (Dkt. 1, at 56.) To the contrary, the article notes
11 that BuzzFeed “could find no evidence to support that claim, and Musk did not
12 provide any documentation to support his accusations.” (*Id.* at 57.) The thrust of the
13 article is not even about Mr. Unsworth; it is about Mr. Musk and Mr. Musk’s
14 “erratic” behavior as the CEO of Tesla. (*Id.* at 57.) The article does not accuse Mr.
15 Unsworth of being a pedophile—it accuses Mr. Musk of being an erratic bully. (*Id.*)
16 The words and context of the BuzzFeed article demonstrate that nothing in the article
17 was capable of defamatory meaning.

18 Further, examining Mr. Musk’s words in context demonstrates that even his
19 email to BuzzFeed, examined in isolation, was not defamatory. In plain text, Mr.
20 Musk’s email to BuzzFeed directed BuzzFeed to further investigate the allegations
21 contained therein, which must be considered as part of the context. *See Masson v.*
22 *New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (“[W]ords and punctuation
23 express meaning. Meaning is the life of language.”). The recipient of the email
24 understood that Mr. Musk was requesting only an investigation (TX 42), and
25 concluded that Mr. Musk was acting erratically (Dkt. 1 at 57.) Thus, even were the
26 Court to examine Mr. Musk’s emails alone, Mr. Musk’s statements still are not
27 actionable defamation.

28

1 Because nothing in Mr. Musk's emails, republished in the BuzzFeed article,
 2 can reasonably be read to defame Mr. Unsworth, since the article disclaims that any
 3 potential statements of fact are true, the Court should narrow the issues for trial to
 4 exclude the BuzzFeed September 4, 2018 article. The statements in Mr. Musk's
 5 emails included in the BuzzFeed article are not defamatory per se.

6 **5. Mr. Unsworth May Recover Only Limited Damages Because**
 7 **He Did Not Request A Retraction.**

8 If this Court does not dispose of Mr. Unsworth's claims arising from the
 9 September 4, 2018 BuzzFeed article, the Court should at minimum limit the scope of
 10 damages Mr. Unsworth may claim as a result of this publication. Because BuzzFeed
 11 News is a news publication, California law states that Mr. Unsworth may recover
 12 only special damages, that is damages to property, business, trade, profession, or
 13 occupation, and damages for money spent as a result of the defamation. Cal. Civ.
 14 Code § 48a ("In any action for damages for the publication of a libel in a daily or
 15 weekly news publication...plaintiff shall only recover special damages..."); *see also*
 16 *Anderson v. Hearst Pub. Co.*, 120 F. Supp. 850, 852 (S.D. Cal. 1954) (requiring
 17 plaintiff to request a retraction before recovering general damages is constitutional);
 18 *DiGiorgio Corp.*, 260 Cal. App. 2d at 273 (failure to request a retraction "limits the
 19 extent of the damages recoverable by the plaintiff").

20 This limitation applies unless Mr. Unsworth proves both that he demanded a
 21 correction of the statement within 20 days of discovering the statement, and that
 22 BuzzFeed News did not publish an adequate correction. Cal. Civ. Code § 48a. Mr.
 23 Unsworth never demanded a retraction or correction from BuzzFeed of its September
 24 4, 2018 article, and Mr. Unsworth has admitted that he did not request a retraction
 25 from BuzzFeed and that BuzzFeed has never published a retraction.² Consequently,
 26

27 ² Mr. Unsworth's counsel clearly knew that the article would be published before
 28 it was available to the public, because Mr. Unsworth's counsel is quoted in the article

the Court should determine before trial that the jury may only award Mr. Unsworth special damages with regard to the BuzzFeed publication.

IV. BIFURCATION OF ISSUES.

The parties have not requested bifurcation in this case, and Mr. Musk does not believe that bifurcation is warranted.

V. JURY TRIAL.

Mr. Unsworth's claims for defamation per se and defamation per quod are triable to a jury, as are Mr. Musk's affirmative defenses of consent, unclean hands, failure to mitigate damages, and failure to request a retraction. Mr. Musk seeks a jury trial on all of the claims and issues in this case.

VI. ATTORNEY'S FEES.

Neither Mr. Unsworth nor Mr. Musk is entitled to attorney's fees on the issues set for trial.

VII. ABANDONMENT OF ISSUES.

Mr. Musk has not abandoned any defenses or issues.

DATED: November 18, 2019

Respectfully submitted,

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

By /s/ Alex Spiro

Alex Spiro (admitted *pro hac vice*)
Attorneys for Defendant Elon Musk

more than once giving his opinions about Mr. Musk's statements. (Dkt. 1, at 56-57, 62.) This puts Mr. Unsworth's failure to request a correction or retraction in context—there was nothing to correct or retract, because the BuzzFeed article does not say anything bad about Mr. Unsworth.